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No. 85-1835

In The
Supreme Court of the United States
October Term, 1986

CALIFORNIA,
Petitioner,

vs.

PETER ROONEY,
Respondent.

WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE SECOND APPELLATE DISTRICT DIVISION 7

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether there can be reasonable expectation of privacy, for the purposes of the Fourth and Fourteenth Amendments, with respect to garbage placed in a communal trash bin of a multi-unit apartment building.

2. Whether there is an abandonment of property, for purposes of the Fourth and Fourteenth Amendments, when garbage is placed in a communal trash bin of a multi-unit apartment building.

3. Whether the Fourth and Fourteenth Amendments are violated when a police officer searches a communal trash bin of a multi-unit apartment building without a search warrant, probable cause, or consent.

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BRIEF OF RESPONDENT

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Respondent Peter Rooney, by his counsel, presents his brief in the above entitled matter, urging affirmance of the California Court of Appeals for the Second Appellate District.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Seven is reported (as modified) as *People v. Rooney,* 175 Cal.App.3rd 634, 221 Cal. 49 (1985). A copy of this opinion is set forth at pages 72-111 of the Joint Appendix.

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JURISDICTION

The judgment of the Court of Appeal of the State of California, Second Appellate District, Division Seven was filed on December 13, 1985, and the opinion was modified on December 19, 1985. (JA 72,110.) Timely petitions for rehearing were denied by the Court of Appeal on January 7, 1986. (JA 112.) Timely petitions for review were denied by the California Supreme Court on March 13, 1986. A Petition for Certiorari was filed on May 6, 1986 by the State of California and that Petition was granted on October 14, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

"[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . " U.S. CONST. amend. XIV, § 1.

The pertinent California constitutional provisions include:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." CAL. CONST. art I, § 13.

STATEMENT OF THE CASE

On December 3, 1983, an informant told the affiant on the affidavit in support of the ultimately issued search warrant, Officer Shorb, that respondent, Peter Rooney, was accepting wagers on professional football games over the telephone and with an answering machine at (213) 656-8430. Although the informant told Shorb that respondent was "in the location between 1600 hours and 1800 hours," the informant did not tell Shorb the address of "the location."

On December 7, 1983, Shorb ascertained through the telephone company that the number given to him by the informant was registered to a Peter Ryan at 1120 North Flores Street, Apartment # 8, West Hollywood. Shorb also determined that the utilities at that address were registered in the name of Peter Ryan.

On December 13, 1983, Shorb learned from respondent's arrest record that respondent had been arrested three years earlier for bookmaking activities at 1120 North Flores Street, Apartment # 8, West Hollywood. Shorb obtained a booking photo of respondent from the prior arrest.

On December 15, 1983, Officers Shorb and Wyeth went to 1120 North Flores Street, West Hollywood, a 28 unit apartment building with a subterranean garage. The officers entered the garage and conducted a search of the communal trash bin, which measured approximately 8′x4′x5′, and was filled to capacity. Upon reaching the bottom half of the bin, Shorb discovered a brown paper shopping bag with mail addressed to defendant, but not to Peter Ryan, at 1120 North Flores Street, Apartment # 8 West Hollywood, the address obtained from the telephone company and defendant's arrest record. The bag also contained pieces of paper with "sports wagers, pays and owes, and a tally sheet of wagers on professional football teams . . . ."

Based on this trash bin discovery, a search warrant was obtained for respondent's apartment, respondent was arrested, and charges were brought against him under relevant California bookmaking statutes.

Eventually the trial court granted a motion to suppress evidence on the grounds that, inter alia, police had violated respondent's reasonable expectation of privacy in conducting a warrantless, non-probable cause, non-consensual search of the closed opaque trash bag located deep in respondent's communal trash bin.

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SUMMARY OF ARGUMENT

1. There is a preference for the obtaining of a search warrant when police officers intend to search a particular location, having, as here, a sufficient and necessary nexus to a private abode, for evidence of crime. *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022.

2. Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions. *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 515, 19 L.Ed.2d 576. *Coolidge v. New Hampshire,* 403 U.S. 443, 454-455, 91 S.Ct. 2022, 2032; those who seek exemption from this rule must show that an exigency made the warrantless search imperative. *McDonald v. United States,* 335 U.S. 451, 456, 69 S.Ct. 191, 193, 93 L.Ed. 153.

3. If probable cause exists to believe that a garbage container is a repository for evidence of criminal activity, it may be seized under its analogy to the so-called "automobile exception" to the securing of a search warrant, and if reduced to police custody to obviate an exigency, a search warrant must be obtained to search it. *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543; *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975; *Coolidge v. New Hampshire,* 403 U.S. 443, 458, 90 S.Ct. 2022, 2033; *People v. Dumas* (1973), 9 Cal.3d 871, 882; *United States v. Chadwick,* 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), *Arkansas v. Sanders,* 442 U.S. 752, 99 S.Ct. 2586, 61 L.Ed. 2d 235 (1979); *Robbins v. California* (1981), 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744.

4. No probable cause existed in the case at bar to support that respondent's segregated garbage, deposited in a closed opaque brown paper bag, contained evidence of crime such as to open it after it was seized and reduced to police custody without first securing a search warrant. *People v. Rooney,* 175 Cal. App. 3rd 634, 221 Cal.Rptr. 49 (1985).

5. The Fourth Amendment to the United States Constitution protects people, not places, or areas; what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection; but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *Katz v. United States* (1967), 389 U.S. 347, 351-352. In the case at bar, respondent concealed his garbage in a closed, opaque brown paper bag which, when reduced to policy custody, must be opened only via the warrant process. *United States v. Chadwick,* 433 U.S. 1; *Arkansas v. Sanders,* 442 U.S. 753; *Robbins v. California,* 453 U.S. 420.

6. The genesis for the bulk of federal and state garbage can privacy decisions, *Abel v. United States,* 362 U.S. 217 (1960), is distinguishable on its facts; in *Abel,* the defendant left a hotel room via the check out process and thus had not expectation of privacy in either the room or its wastebasket, since he no longer had any connection with either that room or its wastebasket; moveover, *Abel* deposited his items in the wastebasket right under the very eyes of arresting officers, and thus he could hardly have a reasonable expectation of privacy in these items; in the domestic garbage can cases, the homeowner maintains ownership or has standing in his use of the communal trash bin

and has not severed any connection to the trash container/communal bin; thus all federal/state garbage can cases stemming from *Abel v. United States* (1960), 362 U.S. 217 have a faulty foundation/premise and are devoid of analysis.

7. Garbage placed in the domestic garbage cans of America by American citizens is not "abandoned" in the property sense, but is merely placed in the can as a temporary conduit to its ultimate place of destruction/burning/burying in the garbage dumps; the citizens of America recognize that, potentially, professional scavengers, children, and animals may dislodge the garbage but have a reasonable expectation that their garbage will remain private and free from search and rummage by officers of the law acting without warrant, probable cause, or consent. Because of this, there is a reasonable expectation of privacy for the purposes of the Fourth and Fourteenth Amendments with respect to garbage placed in closed garbage cans to comply with whatever the local law provides for the removal of the garbage from the domestic home/curtilage.

8. The Fourth and Fourteenth Amendments are violated when a police officer searches a domestic trash can/communal trash bin without search warrant, probable cause or consent.

9. Garbage placed in garbage cans may be subject to inspection or dislodging by professional, civilian scavengers, children, and animals, but much less probability exists that police will search any given can; the mathematical improbability gives a reasonable expectation of privacy of and in itself.

10. Respondent, being a California citizen, had an already heightened, established, judicially determined reasonable expectation of privacy in his garbage. *People v. Edwards,* 71 Cal.2d 1096, 80 Cal.Rptr. 633, 458 P.2d 713 (1969); *People v. Krivda,* 5 Cal.3rd 357, 95 Cal.Rptr. 62, 468 P.2d 689 (1971). This existing law governed the illegal seizure of his garbage from the communal trash bin in the subterranean garage of his apartment and any change in that law must be non-retroactive as to respondent.

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ARGUMENT I

WHERE POLICE PLAN TO SEARCH AND SEIZE THE CONTENTS OF A DOMESTIC GARBAGE CAN/COMMUNAL TRASH BIN THEY SHOULD SECURE A SEARCH WARRANT; IF EXIGENT CIRCUMSTANCES CAN BE DEMONSTRATED, THEY CAN REDUCE THE GARBAGE CAN TO THEIR CUSTODY AND THEN SECURE A SEARCH WARRANT TO ENTER IT; ABSENT PROBABLE CAUSE TO BELIEVE IT CONTAINS CONTRABAND, WARRANTLESS SEARCHES ARE DISFAVORED.

It is plain that in the case at bar police willfully and premeditatively entered into the subterranean garage of respondent's multi-unit apartment complex and conducted a search of the communal trash bin; this bin was 8'x5'x4' and was filled to capacity with various trash containers/bags deposited by the residents.

Upon reaching the *bottom half* of the 160 cubic foot container, they found a closed opaque brown paper bag identified as belonging to respondent.

The clear goal of the police was to look for evidence of criminal activity, here bookmaking on the part of respondent.

Respondent urges throughout his thesis and this brief that he was entitled to a reasonable expectation of privacy in his trash deposited in a closed, opaque bag in his assigned trash bin, and such authorities of this Court as *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022 requires *police* to obtain a search warrant on such a planned seizure and search for evidence of a crime.

The domestic trash cans of America are so integrally connected to the domestic scene that they should be treated analogous to a home, a garage, or an automobile, or a telephone booth, and if probable cause exists to believe any one of these domestic related appurtenances is a vehicle for crime commission, a search warrant should be obtained to search it, or, given probable cause *and* exigent circumstances, it may be searched on the spot if it could not be reduced to police custody.

In its ruling that a search warrant is necessary for the seizure of *objects* in a *premeditated* entry, seizure, and search, this Court said in *Coolidge v. New Hampshire,* 403 U.S. 443, 484, 91 S.Ct. 2022, 2047:

> "We are convinced that the result reached in this case is correct, and that the principle it reflects—that the police must obtain a warrant when they intend to seize an object outside the scope of a valid search incident to arrest—can be easily understood and applied by courts and law enforcement officers alike. It is a principle that should work to protect the citizen without overburdening the police, and a principle that preserves and protects the guarantees of the Fourth Amendment."

However, it is, of course, true that a garbage can may or may not be as mobile as a vehicle, and thus, analogous to the so-called "automobile exception" to the 4th Amendment it may be searched without a warrant assuming probable cause exists to believe it contains contraband. This would be true of the relatively easily moved personal domestic trash can placed at curbside to await the pickup of the garbage hauler. That can, upon probable cause, could be searched on the spot, or in more compliance with the concept of a closed opaque container reduceable to police custody, seized and thereafter a warrant obtained to enter it. The automobile search rules of *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, and *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, could be and should be, and have been, applied to the garbage can believed to contain contraband. See, for example, *People v. Dumas* (1973), 9 Cal.3d 871, 882 Fn. 9, 884; *People v. Rooney*, 175 Cal.App.3d 634, 221 Cal.Rptr. 49 (1985). Under the reasoning of *United States v. Chadwick*, 433 U.S. 1, *Arkansas v. Sanders*, 442 U.S. 753, and *Robbins v. California*, 453 U.S. 420, where it is believed that a closed opaque trash can, or a given closed opaque trash bag within a communal trash bin offends, and it can be reduced to police custody, the removal of exigent circumstances upon seizure dictates that a search warrant should be secured. In this sense the individual home domestic trash can and the individual trash bag sought in and seized from the communal trash bin are like the trunk shipped via rail to Boston and are unlike the "automobile exception", as is made clear by the Chadwick-Sanders-Robbins trilogy.

Plainly, under the facts of this case, no exigent circumstances prevailed which would circumvent the general rule of *Coolidge v. New Hampshire*, 403 U.S. 443; as early as December 3, 1983, some 12 days prior to the warrantless, non-consensual search of the communal trash bin, police had information concerning respondent's alleged bookmaking activities, and knew of his telephone number. These facts would have allowed them to attempt to place bets via telephone, and if they were successful, seek a search warrant to search the trash bin on the usual theory that police advance, namely, that experienced police officers, "familiar with bookmakers habits, believe that they dispose of betting paraphernalia in their trash," etc.

But, intending to seize and search in the trash bin, the warrant process was circumvented, in defiance of the Coolidge mandate, by the police. Indeed, after reducing respondent's trash to their custody, the police still did not comply with such additional mandates governing the search of closed opaque containers believed, of and in themselves, to offend against the law, set forth by this Court in Chadwick-Sanders-Robbins.

Of and in itself this constitutes a violation of respondent's rights to a reasonable expectation of privacy under the 4th and 14th Amendments.

ARGUMENT II

BASED ON ANALYTIC IN-DEPTH LOGIC, THERE IS A REASONABLE EXPECTATION OF PRIVACY IN A DOMESTIC GARBAGE CAN OR COMMUNAL TRASH BIN; THE EXISTING LAW OF CALIFORNIA, VIABLE FOR OVER 15 YEARS, GAVE RESPONDENT A JUDICIALLY INSURED REASONABLE EXPECTATION OF PRIVACY, DISALLOWING WARRANTLESS, NON-PROBABLE CAUSE, NON-CONSENSUAL SEARCHES OF CALIFORNIA GARBAGE CANS.

As an extension of either the *person* or the *home,* the domestic garbage can and communal trash bin are intregal parts of the domestic scene. It is surely one of the *effects* of the *person* and *home* since it is clearly a necessary and salient element of the carrying on of life itself.

No one quarrels with the proposition that the domestic garage is an extension of the *home* and is therefore entitled to 4th Amendment protection. Indeed, while a domestic garage could arguably be dispensed with, the car housed outside in the weather, it is likely less easy to make an argument that the garbage can, bag, receptacle, or whatever, could be similarly done away with, for then the citizens would be hard pressed to carry on the combustion of life itself. As such, the domestic garbage can is an indispensible and integral extension of both the *person* and the *home* and is itself an *effect* often containing *papers* that, while abandoned in the personal property sense, are not abandoned in the *reasonable expectation of privacy sense* as we analyze below. In preparation for that analysis, we note with careful interest that the cases

upholding the warrantless, non-probable cause, non-consensual seizure and search of the domestic garbage cans (notably the multitude of U.S. Circuit Courts) of this nation do so with *zero* to little analysis, but simply, and tersely, state that "abandoned property" is entitled to no reasonable expectation of privacy. We echo one probative dissenting state judge (*People v. Huddleston,* 38 Ill. App.3d 277, 347 N.E.2d 76, 81, Justice Stouder) that the "results in the cases relied upon by the majority support the majority opinion (but) these cases *have internal weaknesses and are not sufficiently persuasive.*"

Of course they are not "sufficiently persuasive" for they are totally *conclusionary,* unsupported by any considered *analysis.* In contrast, such leading cases as *People v. Edwards,* 71 Cal.2d 1096 and *People v. Krivda,* 5 Cal. 3rd 357, and studied dissents in the cases of terse and shallow majority opinions upholding warrantless seizures, present in depth analysis in support of a reasonable expectation of privacy in the domestic garbage can.

In fact, one broad introductory comment must be made: it is the *garbage can,* or the *communal trash bin,* which is the arm of the *person,* the *home* and the *effect* that is to *be accorded protection;* the *contents* achieve their protection derivatively by virtue of being *within* the key protected garbage can. Naturally, if one spews his refuse out in the open for all to see without required rummaging or searching, we do not illogically assert a reasonable expectation of privacy in that limited circumstance.

This Court declared in *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) that the "Fourth Amendment protects people, not places." Under

the proper interpretation of *Oliver v. United States,* 466 U.S. 170, 176, in considering the scope of the Fourth Amendment as to the protection afforded to "persons, houses, papers and effects," it is clear that the domestic garbage can/communal trash bin is a necessary and actual extension of the *person* and the *house,* and is itself a necessary *effect* which may and does contain *papers* of the owner of that can, or the user of the communal bin, so as to afford protection under the 4th and 14th Amendments.

Thus the fact that respondent's trash bin was located in the subterranean common garage is not the focus; the proper perspective remains on the common bin itself, not its fortuitous location. It is the *bin* which is linked to the *person,* the *house,* and is the 4th Amendment *effect.* Thus, under the protection under *Katz* to the person, it is the garbage can/bin which is to be protected, not its location.

Justice John Marshall Harlan, in a concurring opinion, expressed a two-fold requirement that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." (389 U.S. 347, 361).

In the case at bar, respondent did all that he needed to do under the law of California now extant: he placed his trash in a closed, opaque bag and deposited it in a trash bin judicially determined to be immune from warrantless, non-probable cause, non-consensual search. We argue that society is prepared to recognize garbage can privacy under a manifold of facts known about the manner of garbage collection, the habits of professional/amateur

scavengers, children and animals, the inability of police to meaningfully use garbage can searches as a crime combative tool in a random manner, and finally under a general broad overall canopy that few, if any citizens, welcome police scrutiny of their *effects* and *papers,* including love letters, bank deposit information, contraceptives, tampons, restricted reading materials, and other tell-tale items on the road map of life in the previous week.

It is too akin to telephone tapping and clandestine visual surveillance into private areas of life to find sanction by this Honorable Court without the interposition of a neutral magistrate in the search warrant process.

Thus, the citizens of the United States, and surely those in California, have a reasonable expectation of privacy in their domestic garbage cans/communal trash bins as to warrantless, non-probable cause, non-consensual seizures and searches by police. This is based on well-recognized, or logical reasons and the law of California concerning the search of California garbage cans existing since 1969 in *People v. Edwards,* 71 Cal.2d 1096, 80 Cal. Rptr. 633, 458 P.2d 713 (1969), extended by *People v. Krivda,* 5 Cal.3rd 357, 95 Cal.Rptr. 62, 468 P.2d 689 (1971).

A. The realities of, and knowledge of the citizens concerning, how domestic garbage is collected.

One need go no further, to be convinced that the likelihood of garbage haulers themselves seizing and searching domestic garbage cans is small to non-existant, than to observe the domestic garbage collection process in actual operation.

In any domestic neighborhood, it is usually done by at lea t two men operating huge, covered trucks. As one

man drives, the other hops off the truck, grabs the can or cans, upends each into the well of the truck, and upon the actuation of an elevating mechanism button, the garbage is elevated into the common huge receptacle of the truck. The truck quickly moves on to the next location, and the process is repeated, and so on through the neighborhood. There is simply *insufficient to zero* time for professional garbage haulers to rummage in each can to look for such "valuable" items as spent soft-drink/beer aluminum cans, items of clothing, broken but repairable appliances and other jettisoned matters. We further suspect that professional garbage haulers would not even recognize "pay-owe" sheets, pari-mutuel betting slips, or "drug residue" so as to have revealed to them possible *criminal activity* of our citizens. Thus the *likelihood* of non-police personnel, such as professional garbage haulers, discovering contraband in the small percent of cans which might contain it on a given pick-up day must be miniscule. It is this mathematically small probability that, of and in itself, must dictate a reasonable expectation of privacy in our domestic garbage cans. The average homeowner in America believes that his refuse will be quickly removed from his can, elevated into a truck to join other garbage therein and become intermixed in such an indistinguishable manner as to defy further identification; it will be hauled to the dump, where it will be burned/destroyed/plowed under by Caterpillar tractors, to form the foundation for new housing developments. These beliefs are, of course, well founded because these beliefs are the realities of garbage collectors.

Mathematically, then, the sheer probability of garbage examination by the professional haulers is so

small as to be virtually molecular/atomic in magnitude, and thus a reasonable expectation of privacy at this stage is virtually certain.

B. The professional and amateur scavenger, the child, and the animal.

It is contended by some, including *amicus curiae* Americans for Effective Law Enforcement, that the always potential presence and activities of professional and amateur trash can scavengers diminishes, if not totally abrogates, a reasonable expectation of privacy in domestic garbage cans/communal trash bins.

Of course, it is acknowledged that such persons often make their living by rummaging among the jettisoned items, from a home, deposited in a trash can. Thus the economic gains derived from recycling of aluminum beer and soft drink cans is said to attract scavengers to the trash can, destroying privacy.

The obvious answer to this is that these scavengers look into *every* trash can on the street for readily discernible items such as the aluminum cans, or items of clothing, or repairable appliances, and upon finding these items, take them and depart. They do not play the role of government, police, and law enforcement carrying out clandestine and surreptitious surveillance, search and seizure for evidence of crime. Indeed, these scavengers, likely would not even recognize indicia of crime interposed with the aluminum cans, such as "pay-owe" sheets, pari-mutuel slips, or slight marijuana residue, and hence constitute a far different problem than the clandestine garbage can search by police. The other obvious answer is that the 4th

Amendment was never designed to protect the citizen against search/seizure encroachments by their fellow citizens; it was designed to insulate against *government* acts which violate a reasonable expectation of privacy.

At least one learned jurist has recognized in an extensively analyzed dissent this readily discernible major difference between the *scavenger* and the professional policemen, i.e., a "differential expectation of privacy."

In *Smith v. State* (1973) Alaska, 510 P.2d 793, 803, Chief Justice Rabinowitz stated:

> "Without elaborating, the court rejects as being 'too attenuated' appellant's theory of 'differential expectations of privacy' and in so doing fails to recognize that citizens might expect a few, infrequent invasions of their privacy by third persons, but might simultaneously expect their privacy to remain immune from governmental intrusion. I disagree. *A telephone caller, for example, who conducts a conversation on a 'party line' might reasonably expect brief interruptions from others who were attempting to ascertain if the line were in use. It does not necessarily follow, however, that the same caller would also expect that government agents might be conducting a full-scale warrantless 'search' or tap of his conversations. Similarly, one who deposits refuse into a dumpster might expect some minor, inadvertent examination by garbagemen or other third persons, but such expectations would not necessarily include a detained, systematized inspection of the garbage by law enforcement personnel.* As the California Supreme Court correctly observed in *Krivda:*
>
> "Of course, one must reasonably anticipate that under certain circumstances third persons may invade his privacy to some extent. It is certainly not unforeseen that trash collectors or even vagrants or children

may rummage through one's trash barrels and remove some of its contents. However, as stated in *People v. McGrew*, 1 Cal.3d 404, 412, 82 Cal.Rptr. 473, 478, 462 P.2d 1, 6, 'The hotel guest may reasonably expect a maid to enter his room to clean up, but absent unusual circumstances he should not be held to expect that a hotel clerk will lead the police on a search of his room.' " (5 Cal.3rd 357, 364)

Similarly, in dissent in *State v. Schultz*, Fla.App., 388 So.2d 1326, 1330-1331, Florida Appellate Judge Anstead enunciated:

"In my view, a homeowner, upon placing items in a closed garbage container and placing the container in a position on his property where the container can be conveniently removed by authorized trash collectors, is entitled to reasonably expect that the container and the trash therein will be removed from his property only by those authorized to do so, and that such trash will be disposed of in the manner provided by ordinance or private contract. By sealing the containers in a secure manner and placing the containers on his own property, the owner has done everything within his own means to insure the privacy of the contents thereof, shore of delivering the containers to a central disposal site himself.

"While it is true that one cannot reasonably expect trash containers to be completely safe from the probing of dogs, curious children, the trash collectors themselves, and possibly others, common sense tells us that one should be able to expect that his property and trash containers will be free from search and seizure by the police, neighbors and others who are and should be more knowledgeable and respectful of the property and privacy rights of others. The fact that dogs, or others, may occasionally and wrongfully trespass upon private property and go through one's 'private' trash

> does not justify others in doing so. We should still be mindful of the adage that two wrongs do not make a right. Moreover, we are simply not involved here with the accidental disclosure of contraband because of the activities of dogs, children, or trash collectors."

Of course, *children* rummaging in the trash would be even less likely than adult scavengers to look for evidence of crime, or recognize it if they saw it, and of course hungry *animals* would have zero ability to look for, or discern, criminal activity. It is the police officer, under the 4th Amendment protection afforded every citizen, that is of severe concern to the concept of reasonable expectation of privacy; the meaningful judicial analyzer can readily dismiss the issue of the scavenger, the child, and the animal as being potential encroachers upon the citizen's right to be let alone and free of government invasion of his privacy expectations, and thus reject the specious argument that one should *not* reasonably expect to have privacy from police if one does not from the scavenger, a child, or an animal.

C. The non-probable cause search of garbage cans by police.

Again, mathematical probability dictates a reasonable expectation of privacy in domestic garbage cans by police acting without probable cause to believe a given can contains contraband.

A city such as Los Angeles contains, say, 5 million people, and employs, say 10,000 policemen. Obviously the great bulk of these police are employed in combatting known criminals who are engaging in known criminal activities. This means that extremely few law enforcement

personnel could be used in non-probable cause garbage can searches in a random manner. Assuming even 100 police could be used to search the some million garbage can of a metropolitan area, it follows that the ratio would be a mere 100 police/1,000,000 cans or 1 officer per 10,000 cans, a demonstrably impossible task. When one recognizes that likely relatively few cans, on a given date, contain evidence of crime, it is plain that the local chief of police will not opt for a routine garbage can search detail, burdening his apparently thin force with such unproductive activity.

Of course, if *probable cause* does exist to search a given can, that is a different matter, and calls for the search warrant process.

This mathematical analysis speaks logically and loudly for a belief by the citizenry that there does in fact exist a reasonable expectation of privacy in the domestic garbage cans of America.

D. The logical desire and expectation of the United States citizen as to his garbage contents privacy.

It goes without saying that the contents of one's domestic garbage can is a road map of many factors of his or her life. Everything from contraceptives, used tampons, liquor bottles, pornographic magazines, love letters, medicine bottles, bank deposit information, demands for unpaid bills, and food residue, can and does occupy the typical garbage can. Some even, albeit few, contain marijuana residue and other indicia of crime.

The California Supreme Court, in its well-reasoned cases now constituting the law of warrantless garbage can searches said:

> ". . . We can readily ascribe many reasons why residents would not want their cast-away clothing, letters, medicine bottles, or other telltale refuse and trash to be examined by neighbors or others, at least not until the trash has lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere. Half-truths leading to rumor and gossip may readily flow from an attempt to 'read' the contents of another's trash." *People v. Edwards,* 71 Cal.2d 1096, 1104, 80 Cal.Rptr. 633, 458 P.2d 713; *People v. Krivda,* 5 Cal.3d 357, 366, 96 Cal.Rptr. 62, 486 P.2d 1262.

We can perceive little to zero reason why *any* California citizen, or of any state, would wish to embrace police/law enforcement/government routinely searching his trash can, thus revealing to government his intimate and private life. Surely following the advent of *Bowers v. Hardwick,* — U.S. —, 54 L.W. 4919, our friends of perhaps different sexual preference would not desire the residue of their activities, deposited in their garbage cans, to fall into the hands of law enforcement. The Roman Catholic Church still takes a stand against the use of contraceptives for birth control; our nation's many million Catholics who may transgress this element of the church would find little solace in the knowledge that tell-tale contraceptives would show up in their garbage. Cf. *Griswold v. Connecticut,* 381 U.S. 479. In a like vein, although approved by this Court in *Stanley v. Georgia,* 394 U.S. 357, the showing of home pornographic movies is not approved by all in our society; evidence thereof appearing in the domestic garbage may give concern to a good many of our populace.

It is of significant interest that cases upholding a reasonable expectation of privacy in domestic garbage cans do so with excellent, well-reasoned, logical, in depth analy-

sis, while those who deny such reasonable expectation of privacy do so with little to no analysis. See in addition to *People v. Edwards,* 71 Cal.2d 1096 and *People v. Krivda,* 5 Cal.3d 357, the following: *People v. Huddleston,* 347 N.E. 2d 76, 81-86, Stouder, Justice, dissenting; (Justice Stouder accuses these cases of "having internal weaknesses and not sufficiently persuasive;" Federal Circuit cases are marked with an absence of any real analysis save merely quoting each other by citation.) *Smith v. State of Alaska,* 510 P.2d 793, 799-805, Rabinowitz, Chief Justice dissenting; compare, and in accord with *Edwards* and *Krivda, Everhart v. State,* 274 Md. 459, 337 A.2d 100, 114-116; *Ball v. State of Wisconsin,* 57 Wis.2d 653, 205 N.W. 2d 353.

In *State v. Chapman,* Maine, 250 A.2d 203, 212, the Supreme Judicial Court of Maine noted that a bottle deposited in a trash barrel, still in the garbage, well down in the barrel and covered with trash and paper, exactly as in the instant case, strongly suggested that it was intentionally hidden and concealed, and thus a reasonable expectation of privacy appertained. *Abel v. United States* (1960) 362 U.S. 217, 80 S.Ct. 683, 698, 4 L.Ed.2d 668 was distinguished, where, in *Abel,* it was clear that the defendant abandoned his hotel room and the wastebasket therein in which he had deposited evidentiary items right before the eyes of the police just before his final departure.

In *Bolen v. State,* 544 S.W.2d 918, the Tennessee Court of Criminal Appeals accorded reasonable expectation of privacy in a large trash dumpster located on the defendant's property absent a showing on the part of the prosecution that the defendant had the mental state of abandonment.

In *State of Arizona v. Broom,* 113 Ariz. 495, 557 P.2d 1052 the Supreme Court of Arizona accorded privacy to a small bag placed behind trash cans, but not within them. There was no showing that defendant had "abandoned" the brown paper bag nor had he "knowingly exposed it". See also, for privacy expectation, *Fixel v. Wainwright,* 492 F.2d 480, 483-484 (5th Cir. 1974) (trash container in fenced backyard of apartment building).

The great majority of Federal Circuit Court cases tersely deny an expectation of privacy in trash receptacles in a nonanalytical single sentence, i.e. that "abandoned" property is not entitled to any "reasonable expectation of privacy." Yet these cases never really tell us why one should not expect privacy in the trash, and the instant petitioner's brief is likewise devoid of virginal and analytical supportive explanation. Surely the issue is most simplistic and facile to these laconic Federal and State Courts and the advocates who have successfully urged their unsupported conclusions of "abandonment" equalling no reasonable expectation of privacy.

Following the holdings of such cases as *Work v. United States,* 100 U.S. App. D.C. 237, 243 F.2d 660 (1957), the law of garbage can searches in the United States Circuit Courts is bottomed on cases lacking in depth *analysis* as to *reasonable expectation of privacy.* Commencing with germinal cases stemming from *Abel v. United States,* 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668, each succeeding circuit case embraces its predecessor, or conglomerate predecessors, to conclude that trash is "abandoned" and therefore not subject to a *reasonable expectation of privacy. Abel,* however, must be distinguished because there the

defendant placed the seized items in the wastebasket right under the eyes of the arresting police, and thus it is difficult, if not impossible, to suggest that *Abel* had any reasonable expectation of privacy; moreover, *Abel* preceded the case of *Katz v. United States*, 389 U.S. 347, and therefore must not be read to countermand *Katz's* subsequently developed reasonable expectation of privacy criteria.

One of the first of such cases concluded, in 1962, that a communal trash bin was "outside the curtilage" and that trash was "abandoned", however, without reference to *Abel*. The 3rd Circuit concluded that because of the non-individual control of the trash receptacle, the victim of the garbage seizure had an "insubstantial interest" in the communal bin. In *United States v. Minker*, 312 F.2d 632 (3rd Cir. 1962), a wagering case, the defendant was suspected of running a gambling operation in Reading, Pennsylvania. Various "raids" conducted by the government on several of defendant's locations failed to turn up any evidence linking the defendant to the operation, although adding machines, numbers slips, tally sheets, and other indicia of the profession were uncovered. Eventually government agents arranged with one Damore, a trash collector, to permit them to examine the contents of a trash receptacle located on the premises of the defendant's apartment building used by four tenants and the building superintendent. This step was more fruitful, for "handwriting identified as Minker's" appeared on some of the seized papers, which were leisurely examined off the situs by the agents. The 3rd Circuit held that Minker had "abandoned" this property, although acknowledging that "abandonment was largely a question of intent . . . and

intent, in turn, is a question of fact . . ." The opinion did not disclose whether the paper was lying in plain view within the communal bin, or was in repose within a closed, opaque bag in the bin.

The aftermath of *Abel* surfaced in a 1971 Second Circuit case. In *United States v. Dzialak,* 441 F.2d 212 (2d Cir. 1971), company security investigators believed the defendant, a Railway Express employee, was pilfering articles entrusted to him for delivery, and set up a surveillance of his home; agents seized a closed, opaque cardboard box which was part of trash left between the sidewalk and street in front of the home; a second "trash" seizure occurred a week later. Each revealed incriminating evidence of articles shipped by Railway Express and apparently being diverted to the defendant's personal gain. While noting that local municipal ordinances precluded such rummaging into trash, the Second Circuit asserted that it was not "persuaded", because it was, to them, "abundantly clear that Dzialak *abandoned* the property", relying on *Abel v. United States,* 362 U.S. 217, 241, 80 S.Ct. 683, 698, 4 L.Ed.2d 668 (1960).

Of course, like many of the Federal Circuit cases, the seizure of the closed, opaque, cardboard box, and its reduction to police custody, with no inquiry whether a search warrant should be sought, preceded the analysis of *United States v. Chadwick,* 433 U.S. 1 and *Arkansas v. Sanders,* 442 U.S. 753.

The U.S. First Circuit then embraced, without analysis, the *Dzialak* and *Minker* rationale, finding "abandonment" had obliterated any reasonable expectation of privacy. In *United States v. Mustone,* 469 F.2d 970 (1st Cir.

1972), as early as March 3, 1971, U.S. Secret Service agents believed that the defendants were printing counterfeit money at a location in Lynn, Massachusetts, since they heard "the sound of an offset press in operation" while conducting a surveillance of the premises. Six days later, without securing a search warrant, surveilling U.S. Secret Service officers watched one defendant carrying two large "tied closed" opaque trash bags, and saw them placed on the sidewalk near some garbage cans "several doors away" from their place of operation. The agent seized the bags and took them to the Boston Secret Service office where they were leisurely opened the next day, and agents found impressions of three and one half counterfeit ten dollar notes and three aluminum offset plates stained with green ink. While *People v. Krivda,* 5 Cal.3d 357, was noted, the First Circuit held ". . . we are not persuaded by this authority, however, and hold that when Brennan deposited the bags on the sidewalk he *abandoned* them . . . Implicit in the concept of *abandonment* is a renunciation of any reasonable expectation of privacy in the property abandoned . . . The contrary suggestion strikes us as anomalous . . ." (469 F.2d at 927).

This 1972 case, of course, preceded the "closed opaque container, reduced to police custody, requiring a search warrant to enter it" reasoning of *United States v. Chadwick,* 433 U.S. 1 and *Arkansas v. Sanders,* 442 U.S. 753.

The U.S. 6th Circuit followed suit in 1976, basing its terse "abandonment equals no reasonable expectation of privacy" ruling on *United States v. Mustone,* 469 F.2d 970 (1st Cir. 1972); *United States v. Dzialak,* 441 F.2d 212 (2d Cir. 1971), and *United States v. Minker,* 312 F.2d 632

(3rd Cir. 1962). In *Magda v. Benson,* 536 F.2d 111 (6th Cir. 1976), the defendant was suspected of United States post office burglary; surveillance of his home noted the defendant placing his apparently closed, opaque garbage bag on the "tree lawn" next to the street adjacent to his residence. The surveilling postal inspector later retrieved the bag and opened it without a warrant, although its reduction to the postal inspector's custody obviated any contention of "exigency", and allowed the leisurely securing of a warrant pursuant to *United States v. Chadwick,* 433 U.S. 1 and *Arkansas v. Sanders,* 442 U.S. 753. The District Judge had ruled that *People v. Krivda,* 5 Cal.3rd 357, and its "interpretation of the U.S. Constitution by a California Court is not binding on this Court", and that "no legitimate expectation of privacy exists as to *abandoned* property". The Sixth Circuit Agreed.

The U.S. 7th Circuit embraced "abandonment" in 1978 although giving some space in its opinion to consideration whether a person placing garbage in a trash can could expect it to remain free of disturbance; that Circuit concluded that the defendant "knowingly risked exposure to the public" by placing anything in his trash barrel. In *United States v. Shelby,* 573 F.2d 971, 973 (7th Cir. 1978) the F.B.I. requested the Milwaukee, Wisconsin garbage collectors to turn over closed, opaque bags taken from defendant's garbage cans from behind his home to enable the F.B.I. agents to search these bags for coin wrappers which would evidence that the defendant had been returning to banks for which he had once been the janitor, via a retained key, and there had pilfered coins. The Seventh Circuit first ruled that the defendant had *standing* to ob-

ject to the seizure of his garbage bags under the Fourth Amendment (573 F.2d at 973), but ruled that the concept of "abandonment" made any purported reasonable expectation of privacy a "bad judgment" on the part of the defendant. Here it would appear that no exigent circumstances foreclosed securing a search warrant for the closed, opaque bags, once they were seized, within the reasoning of *United States v. Chadwick,* 433 U.S. 1 and *Arkansas v. Sanders,* 442 U.S. 753, as F.B.I. agents had previously received information that the defendant was bringing substantial quantities of coins into local banks and depositing them.

All of the foregoing cases were tersely cited to support the "abandonment" theory.

The 4th Circuit's contribution occurred in 1978, again relying on all of the above circuit court decisions, and concluding that the act of placing the trash for collection is an act of "abandonment", and thus the 4th Amendment does not apply. *United States v. Crowell,* 586 F.2d 1020, 1024-1025 (4th Cir. 1978) (police directed private contract trash collectors to turn over trash which had been collected from within defendant's *residence;* trash collectors "had no permission" to do this; the Court observed: "While most people probably expect that their garbage will *not* be inspected but rather will be taken to the dump, it is equally true that most people have no clear understanding of what happens to their garbage when it is removed from their premises and have even less expectation of having anything further to do with it once it is removed. *The real question is whether there is a reasonable expectation of privacy that one's garbage will not be searched.*" 586 F.2d

at 1025). Nonetheless, this Fourth Circuit Panel held that "*abandonment*" as a personal property concept foreclosed any further thoughtful analysis, without answering whether the defendant had reasonable belief that police would not be clandestinely contacting his private service garbage man to enlist his cooperation to effect a search of his closed opaque trash bag. In *Crowell*, supra, apparently police surveillance over a period of time led to the conclusion that a PCP synthesis laboratory was operating on the premises, thus foreclosing any contention that exigent circumstances existed to circumvent securing a search warrant for the home and its then internal garbage bag. The warrantless search of the closed opaque trash bag, once reduced to police custody, would seem to violate the reasoning of *United States v. Chadwick*, 433 U.S. 1.

In 1979, the 5th Circuit joined the "abandonment" theory in *United States v. Vahalik*, 606 F.2d 99 (5th Cir. 1979). *Vahalik* illustrates how the "analysis" becomes shorter to nonexistant as the 5th Circuit Court embraces each preceeding Circuit Court.

> ". . . We prefer the view adopted by every United States Court of Appeals to consider the issue, that the act of placing garbage for collection is an act of abandonment which terminates any fourth amendment protection . . ." (606 F.2d 99, 101).

In *United States v. Reicherter*, 647 F.2d 397 (3rd Cir. 1981), the Court mentioned the "reasonable expectation of privacy" principles of *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), but once again ruled "trash placed in its can" to be "abandoned" in the personal property sense and thus not entitled to constitutional protection. By now the reciting of the cases took

much more space than the area needed to assert the single sentence holding "abandonment equals no reasonable expectations of privacy." (See 647 F.2d 397, 399).

The U.S. 8th Circuit case *United States v. Biondich*, 652 F.2d 743 (8th Cir. 1981) *did not* totally rubber-stamp the long line of predecessors, holding that *only when the trash was fully removed* by the garbage haulers did the reasonable expectation of privacy vanish; in Biondich, the commercial haulers in fact, as in *People v. Krivda*, 3 Cal. 3rd 357, had removed the garbage from the premises, and had *thereafter* cooperated with police in allowing a search one block away in a parking lot; hence Biondich's previously existing reasonable expectation of privacy had evaporated by the act of removal of the garbage by the private garbage hauling service. See also *United States v. Sumpter*, 669 F.2d 1215, 1220-1221 (8th Cir. 1982), reaffirming the somewhat unique 8th Circuit concession to the rationale of *Katz v. United States*, 389 U.S. 347, that privacy remains viable *until* the refuse is liberated from the can by non-police garbage haulers.

United States v. Terry, 702 F.2d 299, 308-309 (2d Cir. 1983) returned to the usual norm of the Federal Circuit Courts—long citations of their own cases absent any assertion save that the trash constituted "abandoned" property. Every conceivable Circuit case emanating from the *Abel* decision of 1960 was cited.

In *United States v. Kahan*, 350 F.Supp. 784 (D.C.S.D. N.Y. 1972), a much more thoughtful and scholarly analysis surfaced, rather than a resort to the facile and shallow "abandonment" route. There a government employee was suspected of criminal activity and his personal waste-

basket, cached beneath his desk, was steadily and daily searched for whatever could be found to substantiate generation of federal criminal charges. The Court initially held that there were, indeed, searches, which the Fourth Amendment recognized, occurring, and nothing could support exigent circumstances to obviate getting a warrant, since they were done repetitively. (350 F.Supp. at 781, paragraph (5)).

Secondly, the Court held that Kahan's supervisor could not consent to the search of Kahan's wastebasket (350 F.Supp. at 793, 794), since Kahan had exclusive and personal use of the waste basket (cf. *United States v. Blok*, 188 F.2d 1019, 88 U.S. App.D.C. 326 (D.C. Cir. 1951) where supervisor could not consent to search of government employee's desk).

The third issue was, and is, the omnipresent and ubiquitous "cop-out" of *abandonment* of anything deposited in the waste basket from the law of personal property.

The district judge, with uncommon erudition on the concept of "abandonment", characterized the issue thusly:

> ". . . the question is not whether there has been abondonment in the property law sense compare *Jones v. United States*, 362 U.S. 251, 265-267, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) with *Katz*, supra, 389 U.S. at 351-352, 88 S.Ct. 507, *but rather whether there has been abandonment of a reasonable expectation of privacy as to the area searched or the property seized* . . ." (350 F.Supp. 784 at 795).

The Court then proceeds to the nub of the entire garbage can search problem:

> "From this perspective, the flaw in the government's argument becomes immediately apparent. When Mr. Kahan threw papers in his wastebasket, he did "abandon" them *in the sense that he demonstrated an unequivocal intention to part with them forever.* However, *the undisputable expectation of an employee who discards items in his own wastebasket is that they subsequently will be disposed of and destroyed without prior inspection by others.* In this respect, a wastebasket serves a similar function as the mails—a wastebasket is a vehicle for destroying objects; a mailed package is a vehicle for sending them to someone else. In each case, the objects leave the possession of the person, *but his expectation that the vehicle in which they have been placed will be free from unreasonable governmental searches remains the same . . .*"

It has, of course, been held by this Honorable Court that a person does not give up his expectation of privacy with respect to letters and sealed packages when he deposits them in the mail. *United States v. Van Leeuwen,* 397 U.S. 249, 251-252, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970).

The Court noted, again with uncommon prescience, that

> ". . . there is and can be no claim that Mr. Kahan's *wastebasket* was abandoned by him when he left his office in the evening after work. So long as he remained an employee with an assigned desk under which lay a wastebasket for his exclusive use, whether he was actually in the office at any particular time could not possibly affect his expectation of privacy with respect to that receptacle . . ." (350 F.Supp. at 797).

Thus, by analogy, the only vessel possible for disposal of Mr. Rooney's trash, the apartment house dumpster, is not "abandoned" by Rooney nor any other user,

and the concept of personal property "abandonment" totally misses the significant correct issue:

> "Does the depositor of trash give up, or abandon, his reasonable belief that the trash he places within the non-abandoned trash bin or container will not be scrutinized by police, or others at police direction, and does he still have the *reasonable expectation of privacy* in the ultimate fate of the trash, albeit the trash is abandoned in the personal property sense?" (emphasis added)

Since Peter Rooney is, and was, an assigned user of the common *dumpster* for the apartment complex, he obviously has *standing* to object to its warrantless search.

> The *Kahan* judge notes that, as we do, "Where the government believes that criminal prosecution of an employee is warranted, presumably it will have *probable cause* to believe that the employee has committed, or is committing a crime. In that case, if it has probable cause to conduct a Fourth Amendment search or seizure to obtain evidence of crime, *it can follow the warrant procedure . . .*" (emphasis added) (350 F. Supp. at 798).

Thus *Kahan* presents an uncommonly searching and scholarly analysis of the *true* issue of garbage can searches:

It is not the abandonment of the *trash* in the personal property sense that is at issue; indeed, the true issue is what does the American citizen reasonable believe will be the true fate of his trash, *which he has abandoned in the personal property sense, but not in the reasonable expectation of privacy sense?*

The distinction is, of course, the turning point and the key to erudite and correct analysis, and *scholarly decision,* as opposed to a facile, truncated, circumvented and shallow analysis, and *wrong decision.*

Virtually all cases which approve garbage can searches do so on the non-analytical launch-pad, and point of take-off, and route to cloudy thinking, that there is no "reasonable expectation of privacy" in "abandoned" personal property.

Such a path, urged by the State of California, sorely points out the dichotomy necessary for proper perspective of the "garbage can" search issue of the United States Constitution's Fourth Amendment.

Similar terse state cases are available which hold that "abandoned" property in the trash can carries no reasonable expectation of privacy. See, e.g. *People v. Huddleston,* 38 Ill.App.3rd 277, 347 N.E.2d 76 (1976); but see the scholarly and in depth dissent by Justice Stouder at 347 N.E.2d 76, 81 ff; *Smith v. State,* Alaska, 510 P.2d 793; but see Chief Justice Rabinowitz's detailed in depth dissent at 799 ff; *State v. Schultz,* Fla.App., 388 So.2d 1326; but see scholarly dissent by Judge Anstead at 1329ff.

The conclusion is inescapable that the adherents of no reasonable expectation of privacy in domestic garbage cans do so on the simplistic but non-analytical view that the contents are "abandoned" personal property and then follow with the conclusion that as a consequence no reasonable expectation of property is extant. On the other hand, thoughtful and logical analysis, coupled with desires of the citizens of this freedom loving nation, suggests a reasonable expectation of privacy in these arms of the domestic scene.

E. The equal protection of the law to all citizens regardless of whether they live in a multi-unit apartment house complex, or a single unit domestic home, and independent of the local means that garbage is removed by local custom.

Some cases seem to distinguish between expected privacy in an *individually owned* single depository trash can and the unit at bar, the communal trash bin; other cases seem to distinguish between the homeowner bringing the garbage can from his private land onto a public curb for collection purposes vis-a-vis the can remaining on the property when it was seized and searched. Some cases note trash "bags" being seized and searched as opposed to the more formal garbage can. We suggest these differences are more an exultation of form over substance, and not the true touchstone of the necessary issue whether the equal protection of the law should or should not enshroud all homeowners, not leaving to the fortuity of varied living conditions to determine whether the homeowner might reasonably expect that his trash container would be the subject of warrantless, non-probable cause, non-consensual seizure and search by police.

A matrix of representative Federal and State garbage can cases showing a wide variety of physical garbage can/bin variations, locations, and police-garbage collector interaction next follows; all in general, tersely and erroneously, uphold the seizure and search of the *receptacle* irrespective of its shape or size and independent of its location, on the simplistic "abandonment" of contents theory, i.e., the *contents* are "abandoned" and thus, the *contents* are anomalously not to have a reasonable expectation of privacy. As argued, this simplistic approach is erroneous, for the *container,* as a necessary arm of the *person,* the *home,* and as an *effect,* is entitled to 4th Amendment protection, and the contents while within the closed opaque container, are, at that time, engulfed with the 4th Amendment protection of the closed opaque container.

REPRESENTATIVE GARBAGE CAN CASES

U.S. CIRCUIT COURTS

CASE	SITUS OF GARBAGE CAN WHEN SEIZED	SEIZED BY	RATIONALE FOR DECISION
United States v. Minker, 312 F.2d 632 (3rd Cir. 1962)	Communal trash bin located outside multi-unit apartment	Garbage hauler at direction of govt. agents; investigation of gambling	Outside "Curtilage" of dwelling; abandoned property within the can.
United States v. Dzialak, 441 F.2d 212 (2nd Cir. 1971)	Cardboard boxes located between sidewalk and street in front of home	Railway Express Agent, thus not governmental action; investigation of thefts from Railway Express	Abandoned property in the box and the box itself; *Abel v. United States*, 362 U.S. 217
United States v. Mustone, 469 F.2d 970 (1st Cir. 1972)	"Tied closed" trash bags placed near garbage cans several doors from "print shop."	U.S. Secret Service Agents investigating federal counterfeiting	Abandonment occurred when bags placed on sidewalk.
Magda v. Benson, 536 F.2d 111 (6th Cir. 1976)	Garbage bag on tree lawn next to street adjacent to residence	U.S. Postal inspectors investigating post office burglary	Abandonment; not within the residential curtilage.

CASE	SITUS OF GARBAGE CAN WHEN SEIZED	SEIZED BY	RATIONALE FOR DECISION
United States v. Shelby, 573 F.2d 971 (7th Cir. 1978)	Three covered garbage cans behind garage inside a low fence near alley	Sanitation workers at direction of F.B.I. agents investigating bank burglary	Abandonment; no reasonable expectation of privacy under *Katz v. United States*, 389 U.S. 347.
United States v. Crowell, 586 F.2d 1020 (4th Cir. 1978)	Trash bags located at a non-designated place at the residence	Garbage haulers at direction of county police who then acquired trash	Placing for collection constitutes abandonment.
United States v. Vahalik, 606 F.2d 99 (5th Cir. 1979)	Garbage bags placed at edge of street for collection	D.E.A. agents investigating methamphetamine distribution	Abandonment when placed for collection.
United States v. Reicherter, 647 F.2d 397 (3rd Cir. 1981)	Outside the fence behind which the can was usually kept; it was moved out to facilitate collection	Philadelphia police and D.E.A. agents posing as garbage haulers	Abandonment when placed for collection.
United States v. Biondich, 652 F.2d 743 (8th Cir. 1981)	Garbage cans located near alley	Garbage collectors later asked by police to turn over garbage for search	Loss of privacy at time the garbage is picked up.
United States v. Terry, 702 F.2d 299 (2nd Cir. 1983)	Sealed and opaque trash bags placed on public sidewalk	D.E.A. agents	Placement of bags on public sidewalk constitutes inconsistency with privacy interest.

United States v. Kramer, 711 F.2d 789 (7th Cir. 1983)	On roadside in front of home for collection by private garbage haulers	Police investigators who took bags to police station and searched them on floor of station	No violation of reasonable expectation of privacy.
United States v. Thornton, 746 F.2d 39 (D.C. Cir. 1984)	Trash bag	Police officers investigating gambling operation	No reasonable expectation of privacy.
United States v. Michaels, 726 F.2d 1307 (8th Cir. 1984)	Communal trash bin of 16 unit apartment complex; separate individual bags within	Alcohol, Tobacco, Firearms Agents	No reasonable privacy interest after placing trash in area for pick-up.
United States v. O'Bryant, 775 F.2d 1528 (11th Cir. 1985)	Briefcase discarded next to overflowing trash bin on a busy city street	Police officer	Inventory search to identify the owner.
United States v. Dela Espriella, 781 F.2d 1432 (9th Cir. 1986)	Trash containers placed at curbside for collection	Federal agents	Warrantless search of abandoned property does not violate 4th Amendment.

REPRESENTATIVE GARBAGE CAN CASES

STATE COURTS

CASE	SITUS OF GARBAGE CAN WHEN SEIZED	SEIZED BY	RATIONALE FOR DECISION
State v. Brown, 200 Ohio App. 3rd 36, 484 N.E. 2d 215 (1984)	Plastic garbage bag placed at curb in front of an apartment building	Police who posed as garbage collectors, even borrowing the city garbage truck	Voluntary abandoned property.
State v. Oquist, Minn., 327 N.W. 2d 587 (1982)	Two plastic garbage bags near public alley behind the home	Police	Householder *does* have expectation of privacy in some garbage can circumstances, but not in this case; *United States v. Biondich*, 652 F.2d 743 (8th Cir. 1981) was noted.
State v. Schultz, Fla. App., 388 So.2d 1326 (1980)	"Swale area" in front of private home—5 green, opaque plastic bags, 2 silver trash cans	Police, who removed them to a secured remote area for examination by several other officers	No reasonable expectation of privacy, unsupported by any analysis; but see erudite dissent at 388 So.2d 1326, 1329.

F. Notwithstanding any other contentions about whether the citizens of America, in general, are entitled to a reasonable expectation of privacy in their domestic garbage cans, it is clear that respondent Rooney occupies a status of reasonable expectation of privacy in his garbage cans/communal garbage bin.

That reasonable expectation of privacy in the domestic garbage cans has existed in California since 1969. In *People v. Edwards,* 71 Cal.2d 1096, the Supreme Court of California held that trash placed in a trash can located in the defendant's back yard was not abandoned, and police violated the defendant's Fourth Amendment rights by vaulting his rear yard fence, entering upon his property, and rummaging in his trash can.

Two years later, the Supreme Court of California reaffirmed the Edwards analysis in *People v. Krivda,* (1971) 5 Cal.3rd 357. In *Krivda,* the garbage can was placed at curbside to await pick-up by the garbage haulers. Police, desiring to search it, intercepted the garbage truck, convinced the driver to empty the well of the truck to avoid commingling of Krivda's garbage, dump the garbage can of interest into that empty well, and drive down the street to allow the police to search it at their leisure.

Even though the can was placed at curbside, and thus police did not have to trespass on the property to seize it, the California High Court, in an extensively analyzed opinion, held, inter alia, that:

> ". . . The placement of one's trash barrels onto the sidewalk for collection is not, however, necessarily an abandonment of one's trash to the police or general public . . . Under such circumstances we hold

> that defendants had a reasonable expectation of privacy that their trash would not be rummaged through and picked over by police officers acting without a search warrant . . ." (5 Cal.3rd 357, 366-367)

People v. Dumas, (1973) 9 Cal.3rd 871 reaffirmed the protection, holding that the "secondary degree of protection [that] applies to automobiles . . . also appears to apply to a trash can placed by the curb for the disposal of its contents . . ."

Of course, respondent's own case decision, *People v. Rooney,* 175 Cal.App.3rd 634, 221 Cal.Rptr. 49 (1985), noted that *Edwards* and *Krivda* were still the viable law of California, affording California residents a reasonable expectation of privacy in their domestic garbage cans against warrantless, non-probable cause, non-consensual searches by police.

Rooney was followed by *People v. Greenwood,* 182 Cal.App.3rd 729, 227 Cal.Rptr. 539 (1986).

It is inescapable, therefore, that respondent was entitled to a reasonable expectation of privacy in his garbage albeit contrary authority appertained in other jurisdictions.

Any change in the law of California should not be made retroactive because of this well-established law governing California garbage can seizures and searches entitling California residents to rely on this protection, believing that they had a reasonable expectation of privacy.

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CONCLUSION

Where police intend to seize and search a domestic garbage can/trash bin, at a specific location, for evidence of crime, a search warrant should be obtained. *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 2047.

If exigent circumstances exist, and probable cause exists to believe the can contains contraband, it may be reduced to police custody and a warrant obtained. *United States v. Chadwick,* 433 U.S. 1.

Logical analysis as to the methods of professional garbage collectors, amateur/professional scavengers, children, and animals, and application of available police personnel, dictate a reasonable expectation of privacy in the domestic garbage can. Like the spoken word on the telephone (*Katz v. United States,* 389 U.S. 347), the contents of the domestic garbage can are often so intimate to life itself as to engender a desire on the part of the citizens that police not be sanctioned to perform warrantless, non-probable cause, non-consensual searches in garbage cans.

The cases upholding garbage can searches do so on the superficial, lack of analysis conclusion that "abandoned" property carried no 4th and 14th Amendment expectation of privacy.

California citizens stand in a different position because of *People v. Edwards,* 71 Cal.2d 1096 and *People v. Krivda,* 5 Cal.3rd 357 as to a reasonable expectation of privacy in domestic garbage cans, disallowing warrantless, non-probable cause, non-consensual search of garbage cans.

Respondent Rooney thus has demonstrated a reasonable expectation of privacy in the communal trash bin,

and the judgment of the California Court of Appeal in *People v. Rooney*, 175 Cal.App.3rd 634, 221 Cal.Rptr. 49 (1985) must be affirmed.

Respectfully submitted,

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